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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 55

THE PEP BOYS, MANNY, MOE & JACK of California, a corporation,

Appellant,

vs.

PYROIL SALES COMPANY, INC., a corporation,

Appellee.

MOTION ON BEHALF OF R. H. MACY & CO., INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

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TOPICAL INDEX.

PAGE

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.... 1

BRIEF.... 3

I. Preliminary Statement.... 3

Reasons for Application for Leave to File Brief as *Amicus Curiae*.... 3
Statement of the Case.... 5
The Basic Statute.... 6
Gist of Appellee's Cause of Action.... 6
Analysis of the Statute.... 8

II. Argument.... 12

Summary of Argument.... 12

POINT A—A person's right to fix the selling price of his own merchandise and honestly to pursue a lawful calling is liberty and property within the protection of the due-process-of-law clause of the Fourteenth Amendment, and as such it may not be abridged by legislative action except for a valid public purpose and in a way that is not unreasonable, arbitrary, discriminatory or inappropriate to a purpose which the Legislature is free to adopt.... 12

POINT B—Since the effect and purpose of Section 1½ of the statute is the fixing of prices of ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the Legislature.... 14

PAGE

POINT C—The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly inappropriate to any valid legislative purpose..... 19

1. The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory..... 19

2. The means adopted by the Legislature in the challenged statute are wholly inappropriate to any constitutional legislative purpose... 26

(a) If it be assumed that the prevention of the use of "loss leaders" is the purpose of the statute, the means adopted are wholly inappropriate to that purpose.. 27

(b) If it be assumed that the prevention of predatory price-cutting (meaning thereby price-cutting with the deliberate intent of injuring other persons) is the real purpose of this statute, the means adopted are wholly inappropriate to that purpose..... 30

(c) If it be assumed that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are inappropriate to the purpose..... 33

(d) If it be assumed that the purpose of the statute is to prevent monopoly, the means adopted are wholly inappropriate to that purpose..... 35

POINT D—The decision of the court below is based upon a misapplication of *Nebbia* v. *New York*, 291 U. S. 502, and upon a misunderstanding of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272..... 38

PAGE

1. The Misapplication of the *Nebbia* Case..... 38

2. The Misunderstanding of the *Doubleday* Case..... 41

CONCLUSION—For the reasons stated, we believe that the challenged statute deprives persons of liberty and property without due process of law. We respectfully submit that the decision of the Supreme Court of California upholding the constitutionality of the statute should be reversed..... 43

CASES CITED.

PAGE

Adams v. Tanner, 244 U. S. 590.....19, 29
Allgeyer v. Louisiana, 165 U. S. 578..... 13
Archie Widener, Inc. v. Goldman (Wisconsin Circuit Court), decided April 24, 1936 (unreported)..... 43

Bailey v. Alabama, 219 U. S. 219..... 31
Bauer v. O'Donnell, 229 U. S. 1..... 36
Block v. Hirsh, 256 U. S. 135, 137..... 18
Bobbs-Merrill & Co. v. Straus, 210 U. S. 339..... 36
Boston Store v. American Graphophone Co., 246 U. S. 8 36
Buchanan v. Warley, 245 U. S. 60.....13, 27
Budd v. New York, 143 U. S. 517.....13, 18
Burns Baking Co. v. Bryan, 264 U. S. 504..... 19

Carter v. Carter Coal Co., 298 U. S. 238 (80 L. Ed. Adv. Ops., 749)..... 22
Central Lumber Co. v. South Dakota, 226 U. S. 157... 30
Coty v. Hearn Department Stores, Inc., 158 Misc. (N. Y.) 516.....20, 38

Darweger v. Staats, 267 N. Y. 290..... 13
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373..... 36
Doubleday Doran & Co. et al. v. R. H. Macy & Co., Inc., 269 N. Y. 272.....3, 12, 13, 16, 22, 35, 38, 41

Eubank v. Richmond, 226 U. S. 137.....22, 31

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1..... 16, 17, 29, 30, 31, 32, 34
Federal Trade Commission v. Beechnut Packing Co., 257 U. S. 441..... 36

German Alliance Ins. Co. v. Kansas, 233 U. S. 389... 18

PAGE

Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398 34

John D. Park & Sons Co. v. Hartman, 153 Fed. 24 36
Johnson & Johnson v. Weissbard, — N. J. Eq. —, 184 Atl. 783 43
Joseph Triner Corp. v. McNeil, 363 Ill. 559 41

Kunsman v. Max Factor & Co., 91 Col. Dec. 345, 521; 55 P. (2d) 177 ..... 38, 42

Liggett Co. v. Baldridge, 278 U. S. 105 ..... 13, 19

Meyer v. Nebraska, 262 U. S. 390 27
Milwaukee Co. v. Reed Drug Co. (Wisconsin Circuit Court), decided April, 1936 (unreported) 43

Near v. Minnesota ex rel. Olson, 283 U. S. 697 31
Nebbia v. New York, 291 U. S. 502 ..... 12, 18, 19, 38, 42
Nectow v. Cambridge, 277 U. S. 183 19
New State Ice Co. v. Liebmann, 285 U. S. 262 ..... 13, 16, 35

People v. Gillson, 109 N. Y. 389 ..... 16, 29, 35
People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53 ..... 13, 29
People v. Nebbia, 262 N. Y. 259, 264 ..... 13, 18
Pierce v. Society of Sisters of the Holy Name, 268 U. S. 510 27

Ribnick v. McBride, 277 U. S. 350 16

Schechter Poultry Co. v. United States, 295 U. S. 495. 33
Schlesinger v. Wisconsin, 270 U. S. 230 19
Seeck & Kade, Inc. v. Tomshinsky, 269 N. Y. 613 ..... 20, 42
Sinclair Refining Co. v. Federal Trade Commission, 276 Fed. 686 (aff'd 261 U. S. 463) 32
Straus v. Victor Talking Machine Co., 243 U. S. 490 ..... 36, 42

Tyson v. Banton, 273 U. S. 418 ..... 13, 16, 29, 35, 41, 42

United States v. Butler, 297 U. S. 1 34
United States v. General Electric Co., 272 U. S. 476 ... 36

PAGE

Washington v. Roberge, 278 U. S. 116.....19, 22
Weaver v. Palmer Bros. Co., 270 U. S. 402..... 19
Weco Products Co. v. Reed Drug Co. (Wisconsin Circuit Court), decided July 31, 1936 (unreported)... 43
Williams v. Standard Oil Co., 278 U. S. 235....16, 17, 34, 41
Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522.....13, 15, 34, 35, 42

Yick Wo v. Hopkins, 118 U. S. 356.....19, 22

PUBLICATIONS AND DOCUMENTS.

Brookings Institute: "Income and Economic Progress" (1935)..... 28
Brookings Institute: "The National Recovery Administration".....28, 30
Prof. Paul H. Nystrom of Columbia University: "Dangerous Trends Under the N. R. A"..... 24
Prof. F. W. Taussig of Harvard University: "Price Maintenance," American Economic Review, Supplement Vol. VI, No. 1..... 25
Prof. Paul D. Converse: "Elements of Marketing"... 23
Federal Trade Commission: "Report on Resale Price Maintenance," Pt. II (1931).....24, 28

STATUTES.

California Statutes, 1931, Chap. 278, p. 583, Sec. 1 (Fair Trade Act)..... 1
California Statutes, 1933, Chap. 260, p. 793, Sec. 1½ (Fair Trade Act)..... 1

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MOTION ON BEHALF OF R. H. MACY & CO., INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for R. H. Macy & Co., Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*.

The question involved in the present case is whether the Fair Trade Act of the State of California (*California Statutes*, 1931, Chap. 278, p. 583, Sec. 1; *California Statutes*, 1933, Chap. 260, p. 793, Sec. 1½) is unconstitutional as in violation of the Fourteenth Amendment of the Constitution of the United States.

The reasons for asking leave to file the accompanying brief are set forth at the beginning thereof.

The attorneys for the appellant and the appellee have consented to the filing of the brief by the undersigned.

Dated, New York, N. Y., October 28, 1936.

LEON LAUTERSTEIN,
Counsel for R. H. Macy & Co., Inc.,
as *amicus curiae*.

IN THE

Supreme Court of the United States

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THE PEP BOYS, MANNY, MOE & JACK of California, a corporation, Appellant, vs. PYROIL SALES COMPANY, INC., a corporation, Appellee.	No. 55.

BRIEF ON BEHALF OF R. H. MACY & CO., INC., AS *AMICUS CURIAE.*

I.

Preliminary Statement.

Reasons for Application for Leave to File Brief as *Amicus Curiae.*

A. The undersigned appeared as attorney of record in the case of *Doubleday Doran & Co. et al.* v. *R. H. Macy & Co., Inc.,* 269 N. Y. 272, wherein the Court of Appeals of the State of New York declared a New York statute, identical in language with the California statute here challenged, to be unconstitutional as violative of the Fourteenth Amendment of the Constitution of the United States. A determination by this Court that the statute involved in the instant case is constitutional may lead to a different decision by the New York Court of Appeals or prompt similar legislation.

Inasmuch as R. H. Macy & Co., Inc., may be affected by the decision of this Court in the present case, it asks leave to file this brief as *amicus curiae*.

B. The challenged statute, if sustained, may cause substantial injury to R. H. Macy & Co., Inc., as well as to other retailers.

R. H. Macy & Co., Inc., conducts a large department store in the City of New York.

For more than seventy-five years R. H. Macy & Co., Inc., and its predecessors have been engaged in the sale of merchandise at retail for cash only. The saving to customers from the policy of selling for cash only and from efficient operation has been extensively and continuously advertised throughout the business existence of R. H. Macy & Co., Inc., and its predecessors. Its growth from a small store to a great merchandising institution has been due in large part to the fact that (except during the period of N. R. A. price restrictions) it has enjoyed the freedom of fixing the selling price of its own merchandise. It has been able to pass on to its customers the savings of its cash policy and its efficient operation. It has been able to sell to its customers merchandise which they desired at prices which they could afford to pay; and it has not been compelled to charge customers for services which they did not want and for which they could not pay without foregoing the gratification of other wants. It has been able to adjust its own business to its internal requirements and to the requirements of its customers.

The challenged statute and similar statutes in other States destroy the freedom heretofore enjoyed by retailers in fixing the selling price of their own merchandise. In many cases this freedom is all that permits a retailer to stay in business. A retailer's most valuable asset is his ability to increase trade by passing on to his customers, through price reduction, the savings due to efficient operation and his particular method of doing business.

The statute here challenged—however it may be described—in operation and effect necessarily strikes at sound, honest and essential principles of retail business. To deny to the retailer the freedom of honestly selling his own goods at his own prices and to oblige him to sell only at a price arbitrarily fixed by private persons who have no interest in his business, is beyond the constitutional limits of legislative power.

Because of the injury threatened to R. H. Macy & Co., Inc., if the challenged statute is sustained, leave to file this brief is requested.

Statement of the Case.

Reference to the opinions below and a complete statement of the case will be found in appellant's* brief. Extended repetition is unnecessary.

The appellee, a wholesale distributor (but not a producer) of a motor lubricant sold under the name of "Pyroil," sues to enjoin the appellant, a retailer, from selling that commodity below the price fixed in contracts between the appellee and other retailers.

The appellee's case is based entirely upon Section 1½ of the challenged statute, and but for that statute there would be no pretense of a cause of action.

By virtue of that statute, an injunction has been sought and obtained restraining the appellant from selling its own merchandise at prices below those fixed in contracts made between the appellee and other retailers and to which appellant is not a party.

It is not charged that the appellant is a party to any price-fixing contract or that it has induced the breach of any contract.

It is not charged that the appellant has infringed any trade-mark rights or passed off spurious goods as genuine, or that the articles which the appellant sells were not in fact Pyroil products.

It is not charged that the appellant has in any manner acted fraudulently or dishonestly.

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* The parties will be referred to by their designations in this Court.

It is not charged that the appellant has sold merchandise at a loss or below cost, or with an ulterior or malicious motive, or for any illegal purpose.

It is not charged that the articles which appellant sold were ever subject to any price restriction unless restriction is validly imposed by the challenged statute.

In substance, all that is charged is that the appellant is selling its own merchandise at prices less than those fixed for similar merchandise by agreements which have been made between private parties and to which the appellant is not a party.

The Basic Statute.

The statute is printed in full in appellant's brief. We merely summarize its provisions:

Section 1 of the statute purports to legalize contracts fixing the resale price of any commodity (i. e., any subject of commerce) which bears the purchaser's trade-mark, brand or name, save in three excepted cases, namely, sales of discontinued goods, sales of damaged goods, and sales by order of court.

Section 1½ goes farther and provides that wilfully and knowingly advertising, offering for sale, or selling any product bearing the producer's trade-mark, brand or name by anyone—*even though he is not a party to any contract fixing the resale price*—at less than the price fixed by a contract between "any vendor" of such product and any other person is unfair competition and is actionable as such at the suit of any person damaged thereby.

Gist of Appellee's Cause of Action.

Stripped of all technicalities the case comes down to this:

A man owns a can of motor oil, a book, a barrel of flour, a jar of cold cream, or any other article which bears the producer's name or brand. The article has been lawfully pur-

chased for $1. The brand may have been in use only a week, or a day, and may or may not be entitled to protection under the Trade-Mark Law. The owner of the article has made no contract with anyone affecting the resale price of the article. He has induced no breach of contract. He has been guilty of no fraud. He seeks to sell the article at a price of his own choosing—say $1.98. He has a customer who needs the article and wishes to buy it at that price. A wholesaler then steps in and says to the owner of the article: "I have made a contract—not with you, but with someone else—that such article shall not be sold below $2.50, or whatever other price I, in my discretion, choose to stipulate in some contract to which you were not a party. It makes no difference that you have bought and paid for the property and that you lawfully own it. It makes no difference that after the purchase you had all the risks of ownership, resale, deterioration, theft, fire, storage, etc., and that I have not assumed any of these. It makes no difference that you can sell it at 98 per cent. profit and that that price is all that your customer can afford to pay. If you sell for less than $2.50, or even one cent less than any other price which is stipulated in some contract to which you are not a party, you will be mulcted in damages and enjoined because the Legislature has given me the entire judicial and executive power of the State to enforce my will over your property. My reason for fixing the price at $2.50 is none of your business. Likewise, my reason for proceeding against you and not proceeding against some other retailer is none of your business. You will sell your own property for at least $2.50—or you will not sell it at all."

This, in substance, is the appellee's claim. This power over another person's property is what was intended to be given to private persons by the challenged statute, despite the appellee's endeavor to put the statute in a more favorable light and to describe it in unrealistic terms.

Analysis of the Statute.

As bearing on the constitutionality of the statute, we note its following aspects:

1. The statute is a private price-fixing act. Private persons—producers, wholesalers, or "any vendor"—are given the power to fix the price at which another person must sell his own property if he sells at all.

2. The power to fix the selling price of another's property is given to private persons irrespective of any consent or agreement thereto by the owner of the property.

3. The power may be exerted over any commodity (i.e., "any subject of commerce") provided that it bears a trademark, brand or even the manufacturer's name. The statute is not confined to any paramount industry which, for special reasons, requires special regulation. Within the broad scope of the statute is every commodity, necessity and luxury alike, and also every industry regardless of its economic importance, its relation to the community or its internal condition. The price of every ordinary commodity handled by every ordinary business may be fixed.

4. The statute is not, and does not purport to be, an emergency measure. It was intended to be written into the law for all time.

5. There is no legislative or administrative finding that price-fixing is necessary with respect to any commodity or industry. The question of whether prices shall be fixed at all is left entirely to the individual discretion, whim or caprice of a producer, wholesaler or "vendor."

6. Prices are not fixed by the Legislature or by any impartial State officer or body after due notice and hearing, but by private persons. No public body supervises the prices fixed. Neither the owner nor the consumer (the persons most

affected by price-fixing) is given any opportunity to be heard, much less any voice in fixing the price. No body, either judicial or administrative, can review the price fixed by private persons.

7. The price may be fixed in the uncontrolled and absolute discretion of a manufacturer, distributor or "vendor" for any reason, or for no reason. It may be fixed high, low, or anywhere in between. It may be fixed arbitrarily, capriciously, or unwisely, or because of mistake, ignorance or malice. It may be imposed, withdrawn and changed when and as private persons will. There are no standards or limitations prescribed by the statute. Once a manufacturer, wholesaler or "vendor" fixes a price, his will has the force of law if he or some competing retailer chooses so to regard it. And if the person who has the price of his own property thus fixed by others does not bow to their will, the whole executive and judicial machinery of the State is invoked against him, and he may be held liable for damages or enjoined.

8. Not only are private persons given the power to fix the prices at which another person may sell his own property, but private persons are likewise given unlimited and absolute discretion as to the enforcing of the fixed price. Failure to observe the fixed price is not made a crime, nor is the fixed price enforced by any State body or officer. The manufacturer, wholesaler, or even a competing retailer, may proceed against such retailer as he chooses. He may act for any reason or for no reason, capriciously, maliciously, or unwisely; and he may favor one retailer over another. By proceeding against a certain retailer and not against another, he may drive the former from business and favor the latter. The statute gives to private individuals the power of economic life and death over retailers.

9. There is no requirement that contracts entered into pursuant to the statute be uniform, or that a uniform price be fixed. Various special privileges may be given in connection with the contracts to some retailers and not to others. A manufacturer, wholesaler or "vendor" may enter into in-

numerable contracts, each fixing a different price with respect to the same sort of article. The statute, nevertheless, gives to private individuals the power to compel retailers who never signed any contract to observe the price fixed in "any contract."

10. The statute permits private persons to fix retail prices regardless of local conditions and regardless of the locality in which the retail sales take place. A merchant in a village in the Imperial Valley may be compelled to observe the price fixed by a contract between other persons in San Francisco.

11. There is no requirement that any contract be in writing, or that the price be filed in any public or other place. A manufacturer, wholesaler, "vendor" or competing retailer need merely say that a particular price has been fixed, and the retailer, who may have a large stock of the article on hand, must determine the truth as best he can, without any means of verification, and then proceed to sell at his peril.

12. The statute purports to give price-fixing powers to manufacturers, wholesalers and "vendors" with respect to products which are "in free and open competition" with commodities of the same general class produced by others. But it prescribes no standard or guide and no means for determining when a product is in free and open competition with commodities of the same general class. A retailer who purchases a given article and is not a party to any price-fixing contract must determine—at his peril and with no prescribed means of ascertainment—whether he is free to sell the article at a price of his own determination or whether he is bound by the price fixed by another.

13. The statute is not a prohibition upon sales below cost or at a loss. The statute proscribes sales of one's own property below a price fixed by another, and it is wholly immaterial that the person seeking to sell his own property seeks to sell it above cost, at a handsome profit to himself, with every economic justification, and at the only price that his customer offered to pay.

14. The statute is not a prohibition of price-cutting with an intent to injure or destroy a competitor. Selling one's

own property below the price fixed by another is prohibited even though the owner acts with the best possible motives and is seeking only to conduct his own business and meet competition in a way that has always heretofore been regarded as fair and honorable, and which, in fact, has been required by our Anti-Trust Laws.

15. The statute is not confined to goods to which is attached an established trade-mark, brand or name. A producer of unbranded goods may—overnight—acquire unlimited price-fixing powers merely by placing a name or brand on his product; and this power will extend over his products after he has parted with title thereto and they have come into the hands of owners who never signed any price-fixing contract. It is not necessary that the brand or name should previously have enjoyed any good will or that it will hereafter enjoy any good will or that it be entitled to trade-mark protection. "Any vendor," although he does not own any trade-mark, brand or name, or any good will appurtenant thereto, may by a contract with a single retailer fix the selling price for all other retailers throughout the state.

16. Private persons are given the power to fix the price at which a retailer must sell, regardless of his overhead and cost of doing business, regardless of the services and facilities which he furnishes to his customers and regardless of his own cash needs. No matter how efficiently a retailer may operate he is prevented from passing on to his customers the advantages of the efficient operation. Although a retailer furnishes fewer services and facilities to his customers than his competitors, under this statute he is obliged to charge the same price as his competitors although his customers do not desire, and perhaps cannot afford, to pay for elaborate services and facilities. Although a retailer's very business existence may require him to reduce his prices to convert inventories into cash, he is forbidden to do so unless he discontinues handling the price-fixed commodity, sells damaged goods or goes through a court liquidation.

Our submission is that such a statute cannot be constitutional.

II.

Argument.

Summary of Argument.

A. A person's right to fix the selling price of his own merchandise and honestly to pursue a lawful calling is liberty and property within the protection of the due-process-of-law clause of the Fourteenth Amendment, and as such it may not be abridged by legislative action except for a valid public purpose and in a way that is not unreasonable, arbitrary, discriminatory or inappropriate to a purpose which the Legislature is free to adopt.

B. Since the effect and purpose of Section 1½ of the statute is the fixing of prices of ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the Legislature.

C. The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly inappropriate to any valid legislative purpose.

D. The decision of the Court below is based upon a misapplication of *Nebbia* v. *New York*, 291 U. S. 502, and upon a misunderstanding of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272.

POINT A.

A person's right to fix the selling price of his own merchandise and honestly to pursue a lawful calling is liberty and property within the protection of the due-process-of-law clause of the Fourteenth Amendment, and as such it may not be abridged by legislative action except for a valid public purpose and in a way that is not unreasonable, arbitrary, discriminatory or inappropriate to a purpose which the Legislature is free to adopt.

1. The right to acquire and use property and to fix the price at which one's own property shall be sold is an inherent

and essential attribute of property itself and is subject to the protection of the due-process-of-law clause of the Federal Constitution.

Tyson v. *Banton*, 273 U. S. 418, 429;
Buchanan v. *Warley*, 245 U. S. 60, 74;
People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53, 57.

Likewise, a person's business is a property right and as such is entitled to protection against state legislation in contravention of the Federal Constitution.

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111.

Similarly, the "liberty" protected by the due-process-of-law clause is more than freedom from physical restraint and includes freedom to contract and to pursue a lawful calling.

Allgeyer v. *Louisiana*, 165 U. S. 578, 589.

2. The fundamental rights guaranteed by our organic law cannot be abridged or curtailed by legislative action unless there are special circumstances or conditions justifying such action.

> "Under our form of government the use of property and the making of contracts are normally matters of private and not public concern. The general rule is that both shall be free from governmental interference." (*Nebbia* v. *New York*, 291 U. S. 502, 523.)

See also:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 527;
New State Ice Co. v. *Liebmann*, 285 U. S. 262, 277;
Budd v. *New York*, 143 U. S. 517, 532;
Doubleday Doran & Co., Inc. v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272, 281;
Darweger v. *Staats*, 267 N. Y. 290, 307, 308;
People v. *Nebbia*, 262 N. Y. 259, 264, 265.

3. Freedom from restraint in the use of one's own property being a general rule, and restraint the exception, under what circumstances and conditions, and to what extent, may state legislation curtail the freedom of a citizen and the free use of his property? No one contends that liberty and property are absolute and free from all regulation by the state; but there are constitutional limitations beyond which the state may not go.

The answer to the foregoing question as deduced from the cases hereinafter cited is that under our system of constitutional government restrictions upon liberty and property cannot be imposed unless the restrictive enactment

(a) is for the purpose of protecting the public health, morals, safety or welfare;

(b) does not operate in an arbitrary, unreasonable or discriminatory manner; and

(c) provides means which are relevant and appropriate to achieve a valid, statutory purpose.

Judged by these basic criteria the challenged statute is fatally defective. A legislature cannot, consistently with due process of law, delegate to private persons the power to fix the selling price of all ordinary commodities dealt in by all ordinary businesses.

POINT B.

Since the effect and purpose of Section 1½ of the statute is the fixing of prices of ordinary commodities sold by ordinary businesses, it is not within the scope of any constitutional power of the Legislature.

There is not, and cannot be, any claim by the proponents of this statute that it was enacted for the purpose of protecting the public health, morals or safety. They do, however, seek to sustain the statute as an enactment to protect the public welfare. The statute cannot be so justified.

This statute is not confined to any specific industry upon which, for special reasons, the public welfare depends. It is not confined to businesses affected with the public interest, or to paramount businesses which call for temporary regulation because of economic stress or emergency.

The statute is a general price-fixing grant to private persons. It provides that no one may sell his own property, regardless of its nature, if it bears a manufacturer's brand or name at a price below that fixed by someone else. Every business—whether it is major or minor, and regardless of its economic condition or importance—falls within the broad scope of this statute.

There is no legislative finding, or even a suggestion, that all businesses are threatened with extinction because certain retailers sell at prices other than those fixed by manufacturers, wholesalers or "vendors." The general prosperity of the community is not imperiled because a retailer sells a can of motor oil, a package of razor blades, a lip stick, a book, or any other commodity for less than the price thus arbitrarily fixed.

No case of controlling authority has been found upholding the right of a state to fix the selling price of ordinary commodities sold by ordinary businesses at times which are not declared to be emergencies. On the other hand, time and again, this Court and other courts have held state statutes purporting to regulate the prices of ordinary commodities sold by ordinary businesses unconstitutional. Moreover, the very cases which have upheld statutes regulating prices under certain circumstances have emphasized the special circumstances in the particular industry calling for such regulation, and they have expressly stated that price regulation of ordinary commodities sold by ordinary businesses contravenes the constitutional guarantees of our citizens.

In the following cases state statutes purporting to fix the selling price of ordinary commodities and services were held invalid as transcending the constitutional limitations on legislative power:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522 (Wages);

Tyson v. *Banton*, 273 U. S. 418 (Price of theatre tickets);

Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1 (Price of cream);

Ribnick v. *McBride*, 277 U. S. 350 (Fees of an employment agency);

Williams v. *Standard Oil Co.*, 278 U. S. 235 (Price of gasoline);

Doubleday Doran & Co., Inc. v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272 (Price of books);

People v. *Gillson*, 109 N. Y. 389 (Price of food).

See also:

New State Ice Co. v. *Liebmann*, 285 U. S. 262, 277, *et seq.*

The constitutional principle that the Legislature is without authority to fix the selling price of ordinary commodities is well summarized by this Court in *Ribnick* v. *McBride*, *supra*, in the following language (p. 357):

> "Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, * * *, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power."

In *Williams* v. *Standard Oil Co.*, *supra*, this Court applied the familiar principle that a state may not regulate the selling price of ordinary commodities and held unconstitutional a Tennessee statute purporting to regulate the selling price of gasoline. The Court said (p. 240):

> "Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country."

Can the appellee successfully maintain that motor oil is essentially different from gasoline in respect to the question

here involved? On the question of legislative power this case is essentially the same as the *Williams* case. As to the constitutionality of the means adopted to achieve the statutory purpose, the transgression of the instant statute is greater than that of the Tennessee statute considered in the *Williams* case; for the latter statute at least had the seeming virtue of impartial governmental administration.

In *Fairmont Creamery Co.* v. *Minnesota, supra,* this Court held unconstitutional a Minnesota statute which prohibited under penalty the purchase of cream at higher prices in one locality than in others (after allowances for the difference in cost of transportation). There, as here, the statute sought to compel observance throughout the state of a unit price fixed by private contract in a single transaction. There, as here, the proponents of the statute sought to justify its constitutionality by asserting that it was necessary to preserve free and fair competition. In holding that the legislative attempt was an unconstitutional interference with freedom of contract and property rights, this Court in the course of its opinion said (pp. 8, 9):

> "As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff-in-error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce, but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff-in-error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.
>
> "The real question comes to this: May the state in order to prevent some strong buyers of cream from doing things which may tend to monopoly inhibit plaintiff-in-error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer."

In each of the foregoing cases the constitutionality of the challenged legislation was sought to be upheld under the guise of protecting the public welfare. Arguments as to the elasticity of police power and the right of the Legislature to determine the economic policy of the state were pressed upon the courts. The decisions, however, with a firm unanimity, have refused to uphold statutes which in fact fixed the selling price of ordinary commodities and services. Public welfare does not require such a regulation of private business and is best subserved by leaving our citizens free to manage their own private affairs and honestly to use and dispose of their property on their own terms.

In businesses affected with the public interest and in other paramount businesses, in times of emergency, prices may be regulated. The class of businesses subject to regulation may be expanded by special circumstances, but so long as principles of constitutional law are observed, legislatures—at least in the absence of a grave emergency—cannot compel the butcher, the baker, and the candlestick maker, the artisan, the merchant, and the manufacturer to sell his commodities or services in the ordinary course of business at prescribed prices. Much less can a legislature delegate to private individuals the power to fix those prices.

Indeed, the very cases which have upheld legislative price regulation because of special circumstances or emergency threatening a particular industry, by their rationale and express language, clearly indicate that price regulation of all ordinary business cannot be justified upon any constitutional principle.

> *Nebbia* v. *New York,* 291 U. S. 502, 523, 526;
> *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, 414;
> *Block* v. *Hirsh,* 256 U. S. 135, 157;
> *Budd* v. *New York,* 143 U. S. 517, 532;
> *People* v. *Nebbia,* 262 N. Y. 259, 264, 265.

We submit, therefore, that the Legislature has exceeded its constitutional power in enacting a statute which regulates the selling price of ordinary commodities and is applicable to all ordinary businesses.

POINT C.

The means provided by the statute to achieve its purpose are unreasonable, arbitrary and discriminatory, and are wholly inappropriate to any valid legislative purpose.

Assuming—but not conceding—that the statute is enacted for a valid purpose within the constitutional powers of the Legislature, nevertheless, it provides means of accomplishment so inappropriate to any proper legislative purpose, and permits of such an unreasonable, arbitrary and discriminatory use of power over the liberty and property of citizens, that it is for these reasons alone unconstitutional.

Even a statute enacted for a valid purpose is unconstitutional if, in its operation, it is arbitrary or discriminatory, or if the means adopted to accomplish the purpose are not appropriate to that end. This principle was recognized in *Nebbia* v. *New York*, 291 U. S. 502, 537, 539, where it was said:

> "* * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. * * *
>
> "* * * Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt. * * *"

Further recognition of this same principle is to be found in

Nectow v. *Cambridge*, 277 U. S. 183;
Adams v. *Tanner*, 244 U. S. 590;
Burns Baking Co. v. *Bryan*, 264 U. S. 504;
Weaver v. *Palmer Bros. Co.*, 270 U. S. 402;
Schlesinger v. *Wisconsin*, 270 U. S. 230;
Liggett v. *Baldridge*, 278 U. S. 105;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Washington v. *Roberge*, 278 U. S. 116.

1. *The means adopted by the Legislature to achieve its purpose are unreasonable, arbitrary and discriminatory.*

The challenged statute unconstitutionally vests in private persons arbitrary power to fix the prices at which another

may sell his own property. Private individuals are given unlimited and uncontrolled discretion to fix the selling price of another's property without his consent. The price fixed may be high or low, fair or unfair, reasonable or unreasonable. It may be fixed for any reason or no reason, capriciously or arbitrarily, unwisely, erroneously or maliciously, and with a total disregard for the needs of the retailer's business or the purchasing power of his customers.

The price-fixing power has not been given to any impartial state officer or public body. The statute provides no standard or regulation, and imposes no limit upon the private price-fixing power.* No impartial state officer or body even supervises the price fixed or assures its reasonableness. There is no review by any judicial or administrative body. Private persons are left free and unfettered in the exercise of their discretion over the price of another person's property.

Likwise, the Legislature has given to private persons the unrestrained right to determine whether price-fixing is necessary at all. There is no legislative finding that it is necessary. The Legislature has singled out no specific industry which, for special circumstances as found by the Legislature, requires special regulation. By this statute a private person may fix prices when, and as, he wills, or he may refrain from doing so.

Not only has the Legislature given to private persons the power to determine when prices shall be fixed and how they

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* As indicative of the powers asserted by producers and wholesalers under these statutes, see *Coty* v. *Hearn Department Stores, Inc.*, 158 Misc. (N. Y.) 516, 525, 526, Rosenman, J.:

> "In fact, the contract annexed to the complaint herein permits the producer [Coty] 'from time to time in its sole discretion to revise such minimum resale prices and provides that such revised resale prices shall become effective at such time as specified by Coty, which shall be at least three days after Coty shall have mailed a notice of such revision to the retailer.'"

In *Seeck & Kade, Inc.* v. *Tomshinsky*, 269 N. Y. 613, the Record on Appeal, p. 17, shows that the contract provided:

> "Manufacturer may at any time, or from time to time, in its sole discretion, revise minimum resale prices and such revised resale prices shall be effective, unless otherwise specified by Manufacturer, ten days after Manufacturer shall have given notice thereof to Retailer."

Under the statute these resale prices bind not only those who assented to them, but all other retailers who know about them.

shall be fixed, but it has likewise vested in such private persons arbitrary power to enforce the statute or not to enforce it as they, in their uncontrolled discretion, decide. Non-observance of the fixed prices is not made a crime, and no public body is authorized to compel observance of the fixed price. The remedy provided by the statute is an action for damages or a suit for injunction at the behest of private persons. These private persons may enforce the statute against one retailer and not against another. Their reasons for doing so may be capricious or even malicious. One retailer may have his prices fixed so that he cannot compete with numerous other retailers who may not be coerced into observance of the fixed price.

Furthermore, the statute by empowering a manufacturer or wholesaler contracting with a competing retailer to fix the price that another retailer may charge for his own property, has enabled private persons to nullify completely the economic advantage which a retailer may enjoy because of superior efficiency, low rent, volume, buying power, cash selling, etc. The statute permits private persons to destroy that which may be the retailer's most valuable asset, to wit, his good will resulting from superior efficiency, and his customers' approval and confidence in his method of doing business built up by years of effort and financial outlay. In many cases a retailer's chief appeal to his customers is a price appeal. He is able to sell for less because of efficiency, low overhead and his election not to provide the elaborate services which other stores provide.

To give to private persons the power to compel uniform prices is to give them the power to compel certain retailers to sacrifice their customers to other stores with more elaborate services and facilities—and this, to the detriment of the retailer and the consumer who will ultimately be obliged to pay for these frills of merchandising, whether he desires them or not.

A state legislature cannot constitutionally give to private persons such unlimited power over the liberty and property of other persons as this statute attempts to give them. The power is too unrestrained and too susceptible of abuse.

Very recently in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 80 L. Ed., Adv. Ops., 749, 769, this Court condemned a similar delegation of Federal legislative power to private individuals as violative of the Fifth Amendment. There it was held that a majority of the members of a single distressed major industry could not constitutionally be vested with power to regulate the affairs of an unwilling minority. The Court stated:

> "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than to refer to the decisions of this court which foreclose the question."

Here, the delegation does not even pretend to have the justification of saving a paramount industry in a depressed condition. Under this statute the price of any branded commodity may be fixed by a single contract between a manufacturer or wholesaler and a retailer, and all other retailers who deal in that commodity (even competitors of the contracting retailer) are bound by the statute to observe the price so fixed. To quote again the language of the *Carter* case: "This is legislative delegation in its most obnoxious form."

This Court has also condemned as violative of the due process clause of the Fourteenth Amendment state statutes which, like the challenged statute, have attempted to delegate to private individuals broad powers over the liberty and property of other persons.

> *Eubank* v. *Richmond*, 226 U. S. 137;
> *Washington* v. *Roberge*, 278 U. S. 116.

See also:

> *Yick Wo* v. *Hopkins*, 118 U. S. 356;
> *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272.

We submit, therefore, that under our Constitution, a state legislature cannot delegate to private persons unrestricted

power over the liberty and property of others. It is just such a delegation that the instant statute has attempted, and because of that attempted delegation the statute is invalid.

Not infrequently the proponents of legislation like that here attacked have argued that competition between brands will prevent unreasonable exercise of the power delegated to private persons. They assert that no one will fix too high a price for his branded products because they must compete with other branded products of the same general class.

To this argument there are several conclusive answers:

First, the argument ignores the basic fact of retailing. Retail prices are determined by competition in distribution, not by competition between brands. Retail prices in a free market reflect the cost of distribution and the services furnished by the retailer to the consumer even more than the original cost of the goods sold. More than 50 per cent. of the average consumer's dollar goes to cover distribution costs.*

Retail distribution costs vary greatly as between businesses of different types, between businesses of the same type, between different communities, and between different sections of the same community. A retailer who extends long-term credit, who has an expensive location, who exchanges goods freely, who has elaborate facilities and services and highly trained sales people must charge more for the same sort of merchandise than a retailer who operates a less elaborate store on a cash-and-carry basis, who has a small overhead and who furnishes fewer services. Similarly, an efficient retailer who does a large volume of business may be able to sell the same merchandise cheaper than a smaller type of retailer who is less efficient and who does a smaller volume of business. In the absence of artificial restrictions the price which the consumer pays is higher if the particular retailer with whom he deals has a high distribution cost.

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* Professor Paul D. Converse of the University of Illinois, *Elements of Marketing*, p. 5.

The retailer is not a mere standardized vending machine. The price which a consumer pays for an article which he purchases is not merely for the article alone, but also for the services and facilities which go with it.

Hence, we say that competition between brands cannot determine retail prices. The delegation of price-fixing power effected by the challenged statute must inevitably subject the retailer to arbitrary and capricious action by private individuals, for it gives those individuals complete power over the retailer's charges for his distributional services. This power may deprive a retailer of the good will which he has acquired over many years as a result of giving his customers the best possible goods for the least money by reason of superior efficiency and an economical method of doing business.

From the consumer's point of view the statute puts into the hands of private persons the power to eliminate all of the savings of efficient distribution and to compel the consumer to pay for inefficient operation and for services which he cannot afford and, therefore, does not desire.* This statutory discouragement of efficient distribution ultimately means higher distribution costs and, therefore, higher retail prices. "It is upon the consumer that the real burden of price-fixing falls."†

Secondly, the argument does not meet the possibilities of arbitrary enforcement of this statute by private individuals against some retailers and not against others.

Thirdly, the argument overlooks the fact that if a manufacturer or wholesaler, because of ignorance, mistake or malice, fixes an unfair price, it is the retailer and the consumer who must bear the injury of the price maladjustment.

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*See Federal Trade Commission, *Report on Resale Price Maintenance*, Part II [1931], p. 160.

†Professor Paul H. Nystrom of Columbia University, *Dangerous Trends Under the N.R.A.*, p. 8. See also Federal Trade Commission, *Report on Resale Price Maintenance*, Part II [1931], p. 165.

Even if the most benevolent motives are attributed to the delegees of the price-fixing power, they cannot possibly have the wisdom and the foresight to fix a price which is fair to retailers and consumers under all of the diverse conditions of retail merchandising. They cannot possibly know the internal requirements of a particular retailer's business or when he must reduce his prices in order to raise cash to meet payrolls, taxes, interest, etc. They cannot possibly know the varying costs of the thousands of retailers throughout the state, and hence they cannot fix a price which takes due cognizance of those varying costs.

Fourthly, the whole theory that competition among competing brands will automatically fix the proper price level for each brand is inimical to the very argument upon which the proponents of price-fixing rely to show the need for any price-fixing statute. On the one hand, these persons say that the public is unable to ascertain the merit of merchandise and consequently is misled and overcharged on certain goods because of price-cutting on other goods.* When speaking for a different purpose, these same price-fixing proponents say that the public will, of itself, discriminate between various brands so that, if the price of one brand is raised, public patronage will switch to other brands. The inconsistency of these avowals of concomitant wisdom and ignorance on the part of the consumer remains one of the great mysteries of the price-fixing philosophy.

Finally, brands are often adopted and advertised for the very purpose of avoiding competition with other brands. The success of a brand and of the advertising campaigns in connection with a brand lies in its ability to take the branded articles out of competition with other articles.

While it is true that the price of a can of Pyroil may not be raised to $100 and still compete with a similar oil selling for $1.50, it is not true—in the absence of price competition—

* Professor F. W. Taussig of Harvard University, in an article entitled "Price Maintenance" in the *American Economic Review*, Supplement Vol. VI, No. 1, points out that there is little reason to believe that the public is so gullible. The merchant who cuts prices "does not ordinarily outwit or defraud the purchaser; he enlarges his scale of operations and brings down his overhead charges."

that the price of Pyroil might not be raised, say to $2 or $2.50 and still compete with other oils if a sufficiently vigorous advertising campaign were undertaken.

We submit, therefore, that actual or supposed competition between brands notwithstanding, no legislature can constitutionally give to private persons the power to fix the selling price of other persons' property.

2. *The means adopted by the Legislature in the challenged statute are wholly inappropriate to any constitutional legislative purpose.*

Despite statements and inferences to the contrary in the opinions and arguments below, more is required to sustain a legislative curtailment of liberty and property than a mere legislative finding that some evil exists and the adoption of some means of eliminating the supposed evil. There are constitutional limits beyond which a legislature may not go.

Democracy itself—like free competition—has some evils. Such evils, however, do not furnish justification for legislation abolishing democracy and substituting for it monarchy, communism, or fascism. Such legislation might abolish some of the evils of democracy—but it would also transgress the Constitution.

Even a statute for a valid constitutional purpose is unconstitutional if the means adopted are not reasonably appropriate to achieve that purpose. The promotion of child welfare and education, the encouragement of patriotism, and the prevention of race conflict are all valid legislative purposes. A statute requiring all children to be taken from their parents and reared by official guardians might produce a stronger and a better-educated population and more useful citizens. A statute prohibiting sales of residential property in certain localities might prevent race conflict by keeping white people and negroes apart. Yet, we know that such statutes would be unconstitutional under our system of government as depriving persons of liberty and property without due process of law.

See:

Meyer v. *Nebraska*, 262 U. S. 390;
Pierce v. *Society of Sisters of the Holy Name*, 268 U. S. 510;
Buchanan v. *Warley*, 245 U. S. 60.

The statute here challenged shows no legislative finding or statement as to the statutory purpose. The appellee's allegation that the statute was passed to remedy the evils thought to flow from "leader" and "loss leader" merchandising is patently nothing but a pleader's characterization of the statute. The statute says nothing about "leaders" or "loss leaders." It strikes at all price reduction below the price arbitrarily fixed by private persons. It does this regardless of the degree of the reduction and regardless of its economic justification. The only purpose, which can be ascertained from the language of the statute and from its operation and effect, is to give to manufacturers and wholesalers the absolute power to fix the resale prices of other persons' property and to prevent anybody for any reason from selling his own property for less. The real purpose, we submit, is the result effected by the statute.

Since the Legislature has made no finding as to the evil sought to be remedied and has made no statement as to the purpose of the statute, we consider certain supposed evils which have been at various times decried by the price-fixing interests and the relevancy of the statute thereto.

(a) If it be assumed that the prevention of the use of "loss leaders" is the purpose of the statute, the means adopted are wholly inappropriate to that purpose.

The term "loss leaders," we assume from appellee's complaint, means selling goods at a loss for the purpose of attracting customers to buy other goods at sufficiently high prices to offset the loss.

There is no charge in this case that the appellant has ever sold any merchandise at a loss or for the purpose of attracting customers to other merchandise through the sale of which appellant will make up that loss. From all that

appears in the instant record, the appellant has done no more than sell its own merchandise at a lower price than is desired by the appellee and at prices profitable to the appellant, fair to its customers, justified by its cost of doing business and required by its own cash needs and local competitive conditions.

The advocates of price-fixing attack price competition by the use of invective and question-begging phrases like "loss leaders" and "predatory price-cutting."* They have greatly exaggerated the supposed evils of these practices† in order to freeze prices at levels to their own advantage. This method of approach serves to obscure the real purpose of the price-fixing proponents who want, not so much to abolish "loss leaders," as to fix the one and absolute price at which all retailers must sell and thus abolish or at least lessen retail competition.

Quite obviously, selling below the price fixed by the appellee is not synonymous with "loss leader" merchandising. A cash store can sell for less than a credit store, and it is its right and, indeed, its economic duty to do so. Similarly, an efficient store can, and ought to, sell for less than an ineffi-

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* "Price-cutting" is merely a phrase to describe "any form of price competition regarded as objectionable by the user of the term."

"In its broadest sense it covers any competitive act or practice that tends to result in lower prices or prevents the maintenance or enhancement of prices" (Federal Trade Commission *Report on Resale Price Maintenance*, Part II [1931], p. 9).

"The loss leader problem is one of those far too frequently discussed with easy assumptions and with a utilization of question-begging words playing the role of facts and analyses" (Brookings Institute, *The National Recovery Administration*, pp. 600, 601).

See also *Income and Economic Progress* (Moulton, 1935, The Brookings Institute), pp. 118, 133-136, 153-162.

† The Federal Trade Commission reported after an exhaustive investigation (*Report on Resale Price Maintenance*, Part II [1931], pp. 4, 162):

> "The Commission has been at some pains to find instances of such price cutting which were sufficiently severe to result in a permanent and material reduction of the manufacturer's volume of business, but without discovering any instances in which it could be satisfactorily shown that the decreased volume was primarily due to dealer price cutting. The reports received from dealers regarding their purchase prices and selling prices very rarely show selling prices below the purchase prices."
>
> "No instance has yet been brought to the Commission's attention in which there was conclusive evidence that an article of real merit had been driven off the market by price cutting alone."

cient competitor. Heretofore, it has been regarded as perfectly proper and highly beneficial for a retailer to pass on to his customers the savings due to his efficiency and his method of operation.

If "loss leaders" are an evil, as appellee claims, certainly the statute under consideration goes beyond constitutional limits in combating that evil. Under this statute the price fixed need have no relation to cost or loss, and it need have no relation to the retailer's reason for desiring to fix the selling price of his own property. Private persons may under the statute fix the resale price of another's property at whatever level they arbitrarily select and may prohibit a retailer from selling at 100 per cent. profit if they think he should exact a profit of 200 per cent. The fairness, *bona fides* and economic justification of selling at the lower price are irrelevant considerations.

Even if the prohibition of "loss leaders" is assumed to be a valid purpose, the Constitution does not permit the means of suppression enacted by the challenged statute. This statute condemns all price reduction provided only that the goods bear any sort of name or brand and strangers have made a single contract as to such goods.

The Legislature cannot ignore "the righteous distinction between guilt and innocence." It cannot fix "a resale price where evils are absent as where they are present." "It is not permissible to enact a law which spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught." (*Tyson* v. *Banton*, 273 U. S. 418, 442, 443.)

Similar views were expressed by this Court in *Adams* v. *Tanner*, 244 U. S. 590, 594, 595, and in *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 9, 10.

The New York courts have likewise held that legislation cannot proscribe honest dealing and fair competition under the guise of prohibiting dishonest and fraudulent practices.

People ex rel. Moskowitz v. *Jenkins*, 202 N. Y. 53, 58, 59;

People v. *Gillson*, 109 N. Y. 389, 399.

Accordingly, we submit that the Legislature, even assuming that it sought to prevent the use of "loss leaders," has exceeded the constitutional limits of its powers for it has sought to compel all retailers to sell their own property at prices fixed by another. Such a broad prohibition of honest and beneficial business is not an appropriate means of ensnaring a few supposed wrongdoers. Indeed, merely selling one's property below cost is not necessarily an economic evil* and we doubt that it can be made *per se* illegal.

(b) If it be assumed that the prevention of predatory price-cutting (meaning thereby price-cutting with the deliberate intent of injuring other persons) is the real purpose of this statute, the means adopted are wholly inappropriate to that purpose.

It is not such predatory price-cutting that is condemned by the statute. The statute applies indiscriminately to all sales of all branded commodities knowingly made at a lower price than that fixed by some manufacturer or wholesaler. Under this statute the retailer's intent and motive in selling below the price so fixed are wholly immaterial. A retailer cannot, without risk of serious liability, sell for less than the price so fixed, although the lower price at which he desires to sell yields him a fair profit, is adopted with the best possible motive, and is a fair market price, honestly resulting from his efficiency and economical operation and the play of competitive forces.

Even though a statute prohibiting price-cutting for the deliberate and definite purpose of injuring others might be valid, this statute which prohibits selling below the price arbitrarily fixed by private persons cannot be upheld. This is shown by a comparison of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, and *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157.

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*"It is a well-known business fact, however, that there are conditions in which business men find it profitable for a time to sell below their costs—even their direct costs—even though they have no hope of thereby attaining a monopoly position. During periods of depression, for example, nothing is more common than business men selling below cost 'to stay in the business picture.' Far from hoping to attain a monopoly, they hope merely to stay alive" (*The National Recovery Administration*, Brookings Institute, p. 593).

In the latter case this Court upheld the constitutionality of a South Dakota statute prohibiting local price discriminations "for the purpose of destroying competition of any regular, established dealer in such commodity or to prevent competition of any person who, in good faith, intends to become such dealer."

In the *Fairmont Creamery* case this Court held invalid a Minnesota statute prohibiting price discriminations without regard to the motive or intent behind it. This difference between the South Dakota statute in the *Central Lumber* case and the Minnesota statute in the *Fairmont Creamery* case was sufficient to invalidate the latter.

Like the Minnesota statute, the statute here challenged applies irrespective of motive or intent of the person accused of selling his own property at his own price.

To avoid this principle the appellee may assert that in this case the appellant is charged with price-cutting "for the purpose of interfering with and disrupting plaintiff's [appellee's] said contracts and business" (R. 4). This is no answer to our argument.

Under the plain language of the statute, it is unnecessary to plead or prove any such purpose to invoke the statutory remedies, and intent and motive have nothing to do with the case. Appellee's allegation notwithstanding, the constitutionality of the statute must be judged by its effect and by the possibilities of what may be done under it.

> *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 11;
> *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 708, 709;
> *Eubank* v. *Richmond*, 226 U. S. 137, 144;
> *Bailey* v. *Alabama*, 219 U. S. 219, 235, 238, 244, 245.

We note also that appellee's allegation is not the equivalent of an allegation of spite, malice or intent to injure or destroy competition. All competition—even the fairest—is, in a sense, for the purpose of "interfering with" or "disrupting" someone's business. As was said by the Circuit Court of

Appeals in *Sinclair Refining Co.* v. *Federal Trade Commission*, 276 Fed. 686, 687, 688 (aff'd 261 U. S. 463):

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. Expense attending the use of any weapon, the foolishness of it, the fact that a method is uneconomical, or that the competitor cannot meet any method or scheme of competition because it will be ruinous to him to do so, have not, nor has either of them, ever been held unfair. Such things are a part of the strife inherent in competition. Some merchants sell and deliver goods at the counter and you must take them away; others deliver them at your house, or in any town, state or country—that is merely a part of the bargain. Some people deliver a hat in a bag at the store; others deliver it at your house in a fancy box that is used by many purchasers as a container."

Any vigorous competition by the appellant with the appellee's customers is for the purpose of obtaining business. In the absence of monopoly no one merchant can have all of the business. Competition presupposes that a customer gained by one merchant is lost at least for a time to another. Any such competition might lead the appellee's customers to regard the restrictive price fixing contracts which they have with the appellee as undesirable or as financially onerous. In this sense—and in this sense only—has the appellant's competition been for the purpose of "disrupting" or "interfering with" the appellee's contracts and business. But such language does not allege legal wrong unless the statute is a valid restriction on competition.

Under the holding of this Court in the *Fairmont Creamery* case, a state legislature, under the guise of eliminating preda-

tory price-cutting, cannot eliminate all price competition. The challenged statute does eliminate all fair price competition, and it is, therefore, unconstitutional.

(c) If it be assumed that the prevention of unfair competition is the purpose of the statute, the means of preventing such practices are inappropriate to the purpose.

> "Unfairness in competition has been predicated upon acts which lie outside the ordinary course of business and are tainted by fraud or coercion or conduct otherwise prohibited by law." (*Schechter Poultry Co.* v. *United States,* 295 U. S. 495, 532.)

If the challenged statute is really aimed at the suppression of unfair competition, it has adopted means most inappropriate to achieve that purpose, for it condemns all price competition whenever some manufacturer or wholesaler so commands, and only then. The statute says in effect that no retailer may sell branded goods which he owns at less than the price fixed by another although those goods are genuine and although there is no fraud, coercion, counterfeiting, passing off, slander, dishonesty or, indeed, anything outside the ordinary course of business or prohibited by law. All retail price competition in all branded goods is declared to be "unfair" if a manufacturer or wholesaler does not want such competition to continue.

Can the Legislature suppress honest and fair competition merely by labeling it "unfair"? If it cannot, this enactment destroys liberty and property without due process of law as the cases hereinbefore discussed amply show.

It is wholly immaterial that the Legislature has declared that selling one's own property below the price arbitrarily dictated by another is unfair competition. Selling one's own goods below a price fixed by a manufacturer or a wholesaler is not unfair competition, and no legislative declaration can, with due regard to the Constitution, make it unfair competition.

The legislative purpose and the means adopted by the Legislature to achieve that purpose are always subject to judicial scrutiny. If the purpose be not a valid one, or even if valid, if the means adopted to achieve that purpose are unreasonable, arbitrary or discriminatory, or if they are inappropriate to a proper constitutional purpose, the courts may so declare,—whatever language the Legislature may have used.

Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522, 536;
Home Building & Loan Association v. *Blaisdell,* 290 U. S. 398, 442.

See also:

United States v. *Butler,* 297 U. S. 1.

Not infrequently legislatures have sought to justify price regulation of ordinary commodities and the suppression of free and fair competition by declaring that such regulation is a means of achieving a valid statutory purpose. This Court on several occasions has looked through the legislative declaration and has held that the Legislature could not by this method deprive citizens of their constitutional rights of liberty and property.

In *Williams* v. *Standard Oil,* 278 U. S. 235, the Court held unconstitutional a state statute attempting to fix the price of gasoline although the Legislature declared that the regulation was to prevent unfair and improper trade practices and that the gasoline business was affected with a public interest.

Again, in *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, this Court held unconstitutional a state statute attempting to make the price of dairy products as fixed by a single transaction the uniform price throughout the state, although the Legislature declared that the regulation was for the purpose of preserving free competition.

Similarly, this Court has condemned price-fixing statutes although the Legislature has declared that the business sought to be regulated was affected with a public interest.

Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522;
Tyson v. *Banton,* 273 U. S. 418.

See also:

New State Ice Co. v. *Liebmann,* 285 U. S. 262.

In *People* v. *Gillson,* 109 N. Y. 389, the proponents of the legislation there challenged sought to support it as a means of preventing fraud and adulteration of food and argued that no one could sell food for less than his competitors and at the same time deal honestly. The New York court, while recognizing that the Legislature had power to prohibit the adulteration of food, rejected the argument and condemned the statute as unconstitutional. The court pointed out that giving gifts or selling for less than certain competitors is not dishonest and "may simply be the old story of a small profit on large sales instead of a large profit on small sales," and that the effect of the statute was not to preserve fair competition, but to eliminate competition and destroy constitutional rights.

These cases show that the Legislature cannot, by the use of an epithet, enlarge its own powers so as to deprive citizens of liberty and property without due process of law.

The statute here challenged in fact forbids honest dealing and the honest use of one's own property. It has no relation to anything that has ever been understood to be embraced within the term "unfair competition."

(d) If it be assumed that the purpose of the statute is to prevent monopoly, the means adopted are wholly inappropriate to that purpose.

In *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.,* 269 N. Y. 272, the proponents of the challenged statute urged that such legislation was necessary to prevent monopoly.

The argument was that since large corporations who distribute their own products at retail through their own agents can, under the decision in *United States* v. *General Electric Co.,* 272 U. S. 476, fix their own retail selling price, *ergo,* every producer should be able to fix the selling price on products made by him and sold to others. In this way it is asserted that large corporations and small business men will be placed on equality.

The argument involves a strange *non sequitur.* The very basis of the *General Electric* case is that a producer who is to invoke the principle of that decision must *bona fide* distribute *his own* products directly to the consumer. He must take all the risks of his own retail distribution but if he *does sell* to other retailers he cannot under that decision fix *their* prices.

A producer who merchandises under the system approved in the *General Electric* case is merely putting his own price on goods which *he owns.* Neither the rationale nor the language of that case permits him to dictate the price on goods owned by others merely because those goods bear a mark, brand or name. Indeed, and especially when read in conjunction with the cases in this Court condemning resale-price-maintenance agreements as violative of the Anti-Trust Laws, the *General Electric* case requires that price-fixing be limited to one's own property and forbids the extension of price-fixing power even by agreement over property owned by others. This is true whether or not the property bears a trade-mark, brand or name.

John D. Park & Sons Co. v. *Hartman,* 153 Fed. 24;
Dr. Miles Medical Co. v. *John D. Park & Sons Co.,* 220 U. S. 373;
Boston Store v. *American Graphophone Co.,* 246 U. S. 8;
Federal Trade Commission v. *Beechnut Packing Co.,* 257 U. S. 441;
Straus v. *Victor Talking Machine Co.,* 243 U. S. 490;
Bauer v. *O'Donnell,* 229 U. S. 1;
Bobbs-Merrill & Co. v. *Straus,* 210 U. S. 339.

It is one thing for the law to permit a man voluntarily to fix the selling price of his own property. It is quite another for the law to compel a man to sell his own property at a price fixed against his will by someone else. The Constitution permits both the small merchant and the large corporation to fix the selling price of their own property. It does not permit legislation compelling anyone to sell his own property at a price fixed by another.

Not only does the argument advanced by the proponents of this legislation condemn as monopolistic practices heretofore required by this Court as essential to the maintenance of free competition and the prevention of monopoly, but the statute which they support gives stimulus to any monopolistic practices heretofore enjoyed by large corporations. It does not place small business men on an equality with large corporations; it merely permits the large corporations to fix not only selling prices of their own property but the selling price of property owned by others—and this, without assuming any of the risks incidental to retail distribution.

Perhaps the merchandising practices of the General Electric Co. are an evil. If so, they may be dealt with by proper legislation. The fact that certain evils are found in the practices of big corporations does not permit the Legislature to deprive innocent citizens of their liberty and property without due process of law.

We submit Section 1½ of the challenged statute is unconstitutional as depriving retailers of liberty and property without due process of law

(1) because the Legislature is without constitutional power to enact a general price-fixing statute applicable to all ordinary commodities dealt in by ordinary businesses; and

(2) because the means adopted by the challenged statute are arbitrary, discriminatory and inappropriate to any valid legislative purpose.

POINT D.

The decision of the court below is based upon a misapplication of *Nebbia* v. *New York*, 291 U. S. 502, and upon a misunderstanding of *Doubleday Doran & Co., Inc.* v. *R. H. Macy & Co., Inc.*, 269 N. Y. 272.

1. *The Misapplication of the* NEBBIA *Case.*

The opinions of the court below in the instant case and in the related case of *Kunsman* v. *Max Factor & Company* show that the statute was upheld as a valid exercise of police power, mainly upon the supposed authority of the *Nebbia* case. The court below erred in so holding, for, we submit, the *Nebbia* case does not in fact support the challenged statute or any similar statute.

The learned opinion of Mr. Justice Rosenman in *Coty* v. *Hearn Department Stores, Inc.*, 158 Misc. (N. Y.) 516, 529-531, rejecting the argument that the *Nebbia* case upheld the constitutionality of a New York statute identical in language with the California statute here challenged, so clearly points the distinction between the *Nebbia* case and the instant case that we believe quotation is justified:

> "The plaintiff relies chiefly upon the *Nebbia* case (*People* v. *Nebbia*, 262 N. Y. 259; *Nebbia* v. *New York*, 291 U. S. 502; 54 S. Ct. 505; 78 L. Ed. 940; 89 A. L. R. 1469). It is true that there is language in the *Nebbia* case which, ripped from the context of the opinion and divorced from the facts involved, might give some substance to the plaintiff's contention. The facts in that case, however, bear no resemblance to the present one.
>
> "In that case: (1) There were legislative findings of fact based upon a complete and thorough legislative investigation. (2) The enactment was effective only during the prescribed period of a short emergency, which was declared by the Legislature to exist. (3) The fixing of prices was related to one commodity only—milk. (4) The price of milk was to be fixed by a governmental agency after hearings, and was to be subject to judicial review by certiorari. (5) The legislative findings of fact upon which the statute was based were as follows: (a) That milk was an essen-

tial item of diet of all the People of the State; (b) that the absence of proper safeguards of such product would lead to the spread of disease; (c) that proper and adequate safeguards were being threatened in the State of New York because of existing insufficient return to milk producers; (d) that the milk industry was a paramount industry of the State and that the maintenance of it was vital to the credit and economic structure of the State; (e) that the financial structure of the industry was in danger because of certain conditions and various enumerated factors of instability peculiar to the industry itself. (6) The statute was admittedly passed as a health measure under the recognized limitations of the police power. (7) Prosecution and enforcement were lodged with the State authorities.

"Each of the above itemized facts present in the *Nebbia* case indicates a radical difference from the case at bar. A mere statement of the differences should suffice to indicate that the holding of the court in the one is in no way controlling upon the legal conclusions in the other.

"It is true that in the *Nebbia* case the Supreme Court of the United States did not require in terms that the commodity be 'affected with a public interest.' That ancient expression was defined anew in the opinion of the court (291 U. S. 502, at p. 536; 54 S. Ct. 505, 516; 78 L. Ed. 940; 89 A. L. R. 1469) as a phrase which 'can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.' There is implicit in any definition of the phrase, however, the requirement that there be such relationship between the business and the public welfare that governmental interference with the private property and rights involved will be justified in spite of the due process clauses.

"It cannot be contended that the *Nebbia* case is authority for the proposition that the prices of ordinary commodities may, without more ado, be fixed by the Legislature, much less by private individuals. Our Court of Appeals pointed out in *Darweger* v. *Staats* (*supra*) that the *Nebbia* case was not such authority, even if an emergency were declared to exist, and even if the price-fixing power were limited to the period of the emergency. The court stated: 'The briefs place

much emphasis upon *Nebbia* v. *New York* (291 U. S. 502) & *People* v. *Nebbia* (262 N. Y. 259), and claim that this is an authority to sustain legislation fixing the price of any commodity— shoes, clothes, coal, hardware or anything else that may strike the Legislature's fancy, provided an emergency be declared. The fixing of the price of milk in the *Nebbia* case was a mere incident to other regulations which tried to meet an abuse growing up to the detriment of the farmer and his stock. This control of the output protected the very vitals of the industry, and it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain and the like. To say that the *Nebbia* case is an authority for the Legislature to fix the prices of all commodities is not justified by the decision. What the legislative power may be in a given case regarding any industry we do not undertake to say. Sufficient unto the day is the power thereof.'

"Although somewhat different phraseology was used by the courts in sustaining legislation fixing the price of milk, still 'it would not have been a far step to have held, as perhaps it was intimated, that the milk industry was one touched with a public interest, such as water, electricity, grain and the like.' (*Darweger* v. *Staats, supra.*)"

Surely, the *Nebbia* case does not warrant a delegation to private persons of the power to fix the selling price of ordinary commodities owned by others merely because some manufacturer has put a brand upon such commodities. Surely, the *Nebbia* case does not overrule the many decisions of this Court condemning statutes having the essential features found in the statute here, or overturn constitutional principles long recognized and approved by this Court. Indeed, the constitutional principles approved in the *Nebbia* case, far from sustaining the decision now under review, require its reversal.

2. *The Misunderstanding of the* DOUBLEDAY *Case.*

The court below refused to follow the decision of the New York Court of Appeals in *Doubleday Doran & Co. Inc.* v. *R. H. Macy & Co., Inc.,* in which the New York counterpart (Chap. 976, Laws of 1935) of the California statute here involved had been held unconstitutional.

The California court erroneously distinguished the *Doubleday* case upon the following grounds:*

(a) That the contract by which the plaintiff in the *Doubleday* case purported to fix the price of the commodity sold was between parent and subsidiary corporations, whereas in the California cases such was not the fact.

(b) That the plaintiff in the *Doubleday* case voluntarily sold such commodities to the defendant without obtaining from the defendant any agreement as to price reduction, whereas in the California cases the plaintiffs refused to sell to the defendants without agreement for price restriction and the defendants obtained goods elsewhere.

(c) That the plaintiff in the *Doubleday* case showed but a single contract, whereas the plaintiffs in the California cases showed "a uniform system of contracts applied generally to wholesale and retail distributors in the state."

The court in the *Doubleday* case did not base its decision upon any such narrow factual grounds as are asserted by the court below, but upon established constitutional principles long recognized and applied by this Court. In support of its decision the Court of Appeals cited, *inter alia, Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Tyson & Bro.*

* The Illinois court in *Joseph Triner Corp* v. *McNeil,* 363 Ill. 559 (now on appeal to this Court), quoted with approval the California court's supposed distinction of the *Doubleday* case. The criticism of the California case is applicable also to the Illinois case.

v. *Banton*, 273 U. S. 418; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, and *Nebbia* v. *New York*, 291 U. S. 502.

If there is any doubt about the view of the New York Court of Appeals as to the constitutionality of the statute applied to facts like those present in the instant case and the *Max Factor* case, that doubt is removed by the decision in *Seeck & Kade, Inc.* v. *Tomshinsky*, 269 N. Y. 613. In that case (which was argued and decided with the *Doubleday* case) the Court of Appeals, upon the authority of the *Doubleday* case, held the New York statute to be unconstitutional although every fact which the California court counts upon to distinguish the *Doubleday* case was present.

The record of the *Seeck & Kade* case in the New York Court of Appeals shows*

(a) that the contracts relied upon by the plaintiff to fix the resale prices of the commodity bearing the plaintiff's trade-mark were not made with the plaintiff's subsidiary, but with numerous retail dealers in the State of New York (p. 10);

(b) that a price-maintenance contract was tendered to the defendant by the plaintiff (p. 11); that the defendant refused to execute such contract (p. 11); that the defendant did not purchase the goods which it offered for sale at a reduced price from the plaintiff or the plaintiff's distributors, but from other persons (p. 12); and

(c) that the plaintiff, for the purpose of availing itself of the provisions of the Fair Trade Act, entered into uniform contracts fixing the resale price of its goods, and numerous retailers in the State of New York executed such contracts (p. 10).

* Page references are to record in New York Court of Appeals.

We submit that the supposed distinctions made by the court below in rejecting the *Doubleday* case do not exist.

The Court of Chancery of New Jersey, in holding the New Jersey counterpart of the challenged statute to be unconstitutional, expressly rejected the reasoning of the California cases and quoted with approval the opinion in the *Doubleday* case.

> *Johnson & Johnson* v. *Weissbard*, N. J. Eq. , 184 Atl. 783.

Similarly, the Circuit Court of Wisconsin, in holding a similar Wisconsin statute unconstitutional, has expressly rejected the California cases and has approved the *Doubleday* case.

> *Archie Widener, Inc.* v. *Goldman* (Wisconsin Circuit Court [Breidenbach, J.], Milwaukee County No. 149,435, decided April 24, 1936 [not reported]).

See also:

> *Weco Products Co.* v. *Reed Drug Co.* (Wisconsin Circuit Court [Gehrz, J.], Milwaukee County No. 150,371, decided July 31, 1936 [not reported]);
> *Milwaukee Co.* v. *Reed Drug Co.* (Wisconsin Circuit Court [Aarons, J.], Milwaukee County No. 148,586, decided April, 1936 [not reported]).

CONCLUSION.

For the reasons stated, we believe that the challenged statute deprives persons of liberty and property without due process of law. We respectfully submit that the decision of the Supreme Court of California upholding the constitutionality of the statute should be reversed.

Respectfully submitted,

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